Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20544

In the Matter of Petition for Declaratory Ruling in Response to Primary Jurisdiction Referral, *Autauga County Emergency Management Communication District et al. v. BellSouth Telecommunications, LLC*, No. 2:15-cv-00765-SGC (N.D. Ala.)	WC Docket No. 19-44

COMMENT OF THE COUNTIES OF BERKS, BUCKS, BUTLER, CHESTER, CLARION, CUMBERLAND, DAUPHIN, DELAWARE, LEHIGH, SOMERSET, WASHINGTON, WESTMORELAND, AND YORK OF THE COMMONWEALTH OF PENNSYLVANIA

Thomas S. Biemer
Erik L. Coccia
DILWORTH PAXSON LLP
1500 Market St., Suite 3500E
Philadelphia, PA 19102
(215) 575-7000

Counsel for Commentators the Pennsylvania Counties of Berks, Bucks, Butler, Chester, Clarion, Cumberland, Dauphin, Delaware, Lehigh, Somerset, Washington, Westmoreland, and York

April 12, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Decisions

Rules and Regulations

In their Petition, the 911 districts for Autauga County, Calhoun County, Mobile County, and the City of Birmingham (State of Alabama) (collectively, the "Districts") request that the Commission declare that "Internet-protocol customer premises equipment," as used in 47 C.F.R. § 9.3, encompasses all equipment that transmits, processes, or receives IP packets that is located on or within the customer's or building owner's premises. The Pennsylvania Counties of Berks, Bucks, Butler, Chester, Clarion, Cumberland, Dauphin, Delaware, Lehigh, Somerset, Washington, Westmoreland, and York (the "Pennsylvania Counties") support the Districts' straightforward position on the definition of IPCPE and its important role in determining whether voice service is IVoIP. The Districts' position is faithful both to the Commission's existing definition of VoIP in 47 C.F.R. § 9.3 ***and*** to the Communications Act, which defines CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."[1] As the Commission's rules cannot be amended in a declaratory proceeding such as this, the Commission should defer to the primacy of the statutory and regulatory text.

On the contrary, in its Petition for Declaratory Ruling, BellSouth Telecommunications, LLC ("BellSouth") seeks to disregard the text and fundamentally alter the meaning the Commission's long-standing definition of IVoIP set forth in 47 C.F.R § 9.3. The current Rule considers whether the service: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. BellSouth seeks to have the Commission impose a fifth

[1] 47 U.S.C. § 153

requirement to the definition—a criterion based upon whether the customer specifically ordered interconnected-VoIP service from the provider (regardless of the nature of the service that the customer actually received). BellSouth's requested relief has absolutely no support in the text of 47 C.F.R. § 9.3, in the text of 47 U.S.C. § 153, or in the Commission's existing interpretations of these authorities. Indeed, under the existing definition of IVoIP, if a provider delivers voice service that meets Section 9.3's four-part definition then that service constitutes IVoIP—whether the customer's order specifically requested IVoIP service is irrelevant. This is how Section 9.3 has been and should be interpreted.

If the Commission is inclined to add BellSouth's proposed fifth prong to the IVoIP definition, it should nevertheless observe the presumption against giving regulations and statutes retroactive effect and give only prospective effect to the ruling. To do otherwise would create chaos and potentially lead to costly litigation against municipal 911 services providers and other state authorities in places like Pennsylvania and Alabama that have relied on the longstanding four-part definition of IVoIP. The Districts' position offers the Commission the opportunity to maintain fidelity to the statutory and regulatory text and thereby maintain the regulatory certainty that best fosters economic and technologic development. Similarly, by adopting the Districts' approach the Commission would establish a simple, bright-line standard focusing upon the location of the CPE that can be uniformly understood and applied by telecommunications service providers, customers, property owners, 911 services providers, and regulators alike. Conversely, adoption of BellSouth's standard would rely upon concepts not found in the text of the regulations and leave much to the discretion of telecommunications service providers and property owners as well as the vagaries of customer order forms, which is far from a bright-line rule and would undermine regulatory certainty. Further, it would be unworkable for regulators

and municipal 911 services providers to police BellSouth's standard as each customer's order form and actual service arrangement would need to be scrutinized.

The Commission should also decline any invitation to rule on preemption questions, and it certainly should not conclude that the PA 911 Act was preempted or even that it might have been preempted. The Communications Act requires that states charge the same amount for the same type of service. BellSouth and other service providers want the Commission to transform that limit into a prohibition on calculating the rate base—i.e., the number of connections subject to a 911 fee. There is no basis to do so in the statutory text of the Communications Act. Nor is there a reason to adopt such a policy as a technical matter, given the different theoretical burden that different types of service place on the 911 system. In addition, the Commission must be mindful of adopting preemption arguments that risk invalidating many provisions of state 911 laws around the country, with no good reason for doing so. BellSouth's preemption argument would have just such an effect here.

Lastly, in delving into the technical matters at issue, the Commission should not lose sight of the fundamental public policy interests at stake. At bottom, the Alabama litigation underlying this matter and the other similar civil actions pending around the country (including over a dozen in Pennsylvania) are aimed at ensuring the adequate funding of 911 emergency services. In Pennsylvania, 911 emergency services receive the majority of their funding from the 911 fees imposed upon traditional wireline and VoIP voice services; therefore, ensuring that those 911 fees are properly assessed and collected by telecommunications service providers is essential to providing adequate 911 emergency services. Further, by constitutional design, the framers delegated to the states the power and the obligation to police and ensure the health, welfare, and safety of their citizenry. Given those constitutional obligations, the Commission

should respect the decisions of the Pennsylvania Counties, the Districts, and other municipalities to pursue litigation that they deem critical to fulfilling the constitutional burdens that they alone bear. The position advanced by the Districts offers the Commission the best opportunity to remain faithful to the regulatory and statutory text while also favoring the important public interests at stake. Accordingly, the Pennsylvania Counties respectfully submit that the Commission should grant the relief requested by the Districts.

I. STATEMENT OF INTEREST

The Pennsylvania Counties are political subdivisions within the Commonwealth of Pennsylvania. The Pennsylvania General Assembly adopted a statutory scheme, codified at 35 Pa.C.S.A. §§ 5301 *et seq.* (the "PA 911 Act"), to ensure that all residents of the Commonwealth had 911 emergency response services available to them.[2] That scheme imposes on counties a legislative mandate that they fund and provide those 911 emergency services.[3] During the relevant time period,[4] the 911 Act obligated counties to make arrangements with each telephone company providing local exchange telephone service within the county to provide 911 service.[5] The 911 Act also empowered counties to fund the 911 services by imposing a monthly fee on customers.[6] The 911 Act then required service providers to bill and collect the 911 fees from their respective customers and remit that money to the county treasurer.

---

[2] The General Assembly amended the 911 Act, effective August 1, 2015. *See* P.L. 36, No. 12. However, the Pennsylvania Counties have filed litigation that arises under the prior version of the PA 911 Act. Therefore, references in this Comment to the PA 911 Act refer to the pre-amendment version of the law.

[3] 35 Pa.C.S.A. § 5304(a)(1); *see also* 35 Pa.C.S.A. § 5301 note.

[4] *See supra* note 2.

[5] *See* 35 Pa.C.S.A. § 5304(a)(2).

[6] *See, e.g.*, 35 Pa.C.S.A. § 5305(g.1)(1).

Although the 911 Act imposed 911 fees on all types of phone service, it included different mechanisms to calculate those 911 fees. For VoIP service, it imposed a monthly fee on "each telephone number or successor dialing protocol assigned by a VoIP provider to a VoIP service customer that has outbound calling capability."[7] Thus, a VoIP provider was required to charge a fee on every unique phone number that had the ability to make an outgoing call. The 911 Act relied on and incorporated the Commission's definition of VoIP.[8]

Many counties around the Commonwealth, including the Pennsylvania Counties herein, have initiated litigation against certain telecommunications service providers operating within their respective jurisdictions alleging that they have systematically under-billed, under-collected, and under-remitted 911 fees, particularly with respect to business customers (the "Pennsylvania 911 Actions").[9] In the Pennsylvania 911 Actions it is alleged, *inter alia*, that the defendants' misconduct included not charging or remitting any 911 fees for VoIP services and/or classifying

---

[7] 35 Pa.C.S.A. § 5311.14(a)(1).

[8] 35 Pa.C.S.A. § 5302.

[9] A total of sixteen civil actions have been filed. *See Phone Recovery Services, LLC for itself and on behalf of Allegheny County v. Verizon Pennsylvania, Inc., et al.*, Case No. GD-14-021671 (Allegheny Cnty. Ct. of Com. Pls.) (*qui tam* action brought under the Allegheny County False Claims Act); *County of Beaver v. Verizon Pennsylvania, Inc., et al.*, Case No. 10237-2016 (Beaver Cnty. Ct. of Com. Pls.); *County of Berks v. Verizon Pennsylvania, Inc., et al.*, Case No. 15-15867 (Berks Cnty. Ct. of Com. Pls.); *County of Bucks v. Verizon Pennsylvania, Inc., et al.*, Case No. 2016-01028 (Bucks Cnty. Ct. of Com. Pls.); *County of Butler v. Centurylink Communications, LLC, et al.*, Case No. 15-11007 (Butler Cnty. Ct. of Com. Pls.); *County of Chester v. AT&T, Inc., et al.*, Case No. 2015-06910-MJ (Chester Cnty. Ct. of Com. Pls.); *County of Clarion v. Windstream Pennsylvania, Inc., et al.*, Case No. 364-2016 (Clarion Cnty. Ct. of Com. Pls.); *County of Cumberland v. Pioneer Telephone, et al.*, Case No. 2015-04281 (Cumberland Cnty. Ct. of Com. Pls.); *County of Dauphin v. Verizon Pennsylvania, Inc., et al.*, Case No. 2015 CV 5933 MP (Dauphin Cnty. Ct. of Com. Pls.); *Delaware County v. Verizon Pennsylvania, Inc., et al.*, Case No. 2015-004830 (Delaware Cnty. Ct. of Com. Pls.); *County of Lancaster v. Verizon Pennsylvania, Inc., et al.*, Case No. CI-15-06600 (Lancaster Cnty. Ct. of Com. Pls.); *County of Lebanon v. Verizon Pennsylvania, Inc., et al.*, Case No. 2016-00998 (Lebanon Cnty. Ct. of Com. Pls.); *County of Mercer v. Verizon Pennsylvania, Inc., et al.*, Case No. 2016-1081(Mercer Cnty. Ct. of Com. Pls.); *County of Somerset v. AT&T Corp., et al.*, Case No. 571 Civil 2016 (Somerset Cnty. Ct. of Com. Pls.); *County of Washington v. Verizon Pennsylvania, Inc., et al.*, Case No. 2015-4706 (Washington Cnty. Ct. of Com. Pls.); *County of Westmoreland v. AT&T Corp., et al.*, Case No. 2015-05432 (Westmoreland Cnty. Ct. of Com. Pls.); and *County of York v. AT&T, Corp., et al.*, Case No. 2015-SU-002732-49 (York Cnty. Ct. of Com. Pls.).

VoIP service as "PRI" service even though the service met the Commission's definition of VoIP. The Pennsylvania Counties allege that the defendants' conduct contributed substantially to annual revenue shortfalls that they each experienced in 911 funding; shortfalls that were made up with funds from each county's respective General Fund. These funding shortfalls are pervasive throughout the Commonwealth and led the Pennsylvania General Assembly's Legislative Budget and Finance Committee to investigate the funding shortfalls in 2012. Based on additional investigations conducted by the counties litigating the Pennsylvania 911 Actions, it is believed that the losses resulting from the various defendants' non-compliance with the 911 Act total tens of millions of dollars throughout the Commonwealth.

II. DISCUSSION

A. The Districts' Approach To The Definition Of IVoIP Offers Certainty And A Simple, Bright-line Standard That The Commission Should Adopt.

In their Petition, the Districts[10] request that the Commission declare that IPCPE, as used in 47 C.F.R. § 9.3, means all equipment that transmits, processes, or receives IP packets located on or within the customer's or building owner's premises. The Districts' straightforward definition of IPCPE is faithful to the Commission's existing definition of IVoIP in 47 C.F.R. § 9.3[11] as well as the regulation's wellspring, the Communications Act.[12] The Districts' proposed

[10] Unless otherwise noted herein, capitalized terms hall have the meaning ascribed to them in the Summary.

[11] 47 C.F.R. § 9.3 (defining interconnected VoIP as a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.).

[12] *See* 47 U.S.C. § 153 (defining CPE as "equipment employed on the premises of a person (other than a carrier) to originate, route, or terminate telecommunications."). *See In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,* Nos. 17-79, 17-84, 2018 WL 4678555, at *18 (FCC Sept. 27, 2018) ("We start our analysis with a consideration of the text and structure of [the statute at issue]."); *see also Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985)

definition is also consistent with the Commission's existing interpretations of its definition of IVoIP, such as in the Glossary of Form 477.[13] By confirming the primacy of the regulatory text and its existing interpretations, the Commission will not only observe an axiomatic principal of statutory interpretation but maintain the regulatory certainty that best fosters economic and technologic development. To be sure, as this is a declaratory proceeding and not a rulemaking, deference to the regulatory and statutory text will also hedge against any suggestion of agency overreach.[14] Therefore, the Commission should defer to its existing definition and interpretations of IVoIP and grant the relief requested in the Districts' Petition.

In addition, the Districts' position is pragmatic and efficient for all interested parties. Indeed, by making the determinative factor as to whether equipment is CPE a question of whether it is "located on or within the customer's or building owner's premises," the Commission could set a simple, bright-line test that would apply in all circumstances and be easy to understand, easy to apply, and remove from the equation any discretion on the part of the service provider, customer, or property owner. For example, the Districts' approach would not require consideration of the complicated demarcation point and minimum-point-of-entry rules to the CPE determination, including the myriad variations that arise from the discretionary policies

---

("It is axiomatic that the starting point in every case involving construction of a statute is the language itself." (internal citations and quotations omitted)).

[13] *See* FCC Form 477 Local Telephone Competition and Broadband Reporting Instructions at pp. 35-36, *available at* https://transition.fcc.gov/form477/477inst.pdf (the Commission instructs that "Interconnected VoIP service uses IP packet format to transmit voice calls ***between the end-user customer's specialized equipment (such as an IP telephone, IP PBX, or TDM-to-IP converter device that is attached to an ordinary telephone or conventional PBX) and the telecommunications network***." (emphasis added)).

[14] *In re Jt. Pet. Filed By Dish Network, LLC, The U.S.A., And The States Of Cal., Ill., N.C., And Oh. For Dec. Ruling Concerning The Tele. Con. Prot. Act (TCPA) Rules*, 28 FCC Rcd. 6574, 6584 (2013) ("Any revision of this codified interpretation would require a notice-and-comment rulemaking, and is therefore beyond the scope of this adjudicatory proceeding.").

of service providers and property owners.[15] In other words, adopting the Districts' proposal would streamline the regulatory burden on the Commission, municipalities, service providers, customers, and property owners.

Conversely, BellSouth's Petition does not request an interpretation or application of Section 9.3 and is not at all adherent to its text or to the text of the Communications Act. Instead, BellSouth seeks to amend the definition of IVoIP itself—adding a fifth prong to the definition that would render the determining factor in the IVoIP analysis whether or not the customer ordered VoIP. In BellSouth's view, a service is ***not*** IVoIP even if it otherwise meets all four requirements of the Section 9.3 definition so long as the customer's order requests something other than IVoIP, like TDM or PRI service.[16] BellSouth's position finds no support in the text of Section 9.3—neither "customer order," "last mile," or the like appear anywhere in the text—yet Bellsouth would make these terms dispositive. Similarly, BellSouth advocates for a rule where it delivers voice service over the "last-mile" into the customer's premises over IP, utilizing IPCPE and a broadband connection, but the service would be TDM because BellSouth converts the voice from IP to TDM just inches before it reaches the customer's PBX. The voice never enters or leaves the customer's premises in TDM—always in IP. Nonetheless, the customer's "order" and those few inches of TDM transmission would, according to BellSouth, make the service TDM. BellSouth's approach to the point of conversion would completely ignore the Commission's demarcation point rules (described in the Districts' Petition), the

---

[15] *See* 47 C.F.R. § 68.105(a)-(d)(5) (enumerating different standards for determining the demarcation point in single unit and multiunit premises, as well as multiunit premises with more than one customer, including consideration of what is the "closest practicable point" at each location and also allowing for the application of the "reasonable and nondiscriminatory standard operating practices of the provider").

[16] *BellSouth Petition* at p. 20.

Commission's interpretation of the meaning of CPE,[17] and the meaning of CPE under the Communications Act.[18] For these reasons, BellSouth's framework should be rejected as inconsistent with the regulatory and statutory text and inconsistent with the Commission's existing understanding of the demarcation point and CPE.

Lastly, while the Districts' proposed definition of IPCPE would simplify the regulatory burden by applying a bright-line rule separating the provider's and customer's property for purposes of applying Section 9.3, BellSouth's proposal would only muddy the water. For example, customer order forms might include vague product names with no clear connection to how the product is actually delivered or transmitted. Presumptively, order forms will also vary from provider to provider. In other words, the customer order may be of little or no value in the analysis. Nonetheless, BellSouth would make the IVoIP determination dependent on the customer's order. BellSouth's customer-order approach would also make it such that only the provider could determine whether a service constitutes IVoIP. Even if the voice service delivery method required IPCPE and a broadband connection, only the provider would know (1) if it made the "last second" conversion from IP to TDM, and/or (2) the specifics of the customer's order. 911 services providers like the Districts and the Pennsylvania Counties could never independently assess whether a provider was delivering VoIP service. Therefore, BellSouth's approach would be a complete departure from Section 9.3 and should be denied.

---

[17] *See In re Federal-State Jt. Bd. on Universal Services*, 18 FCC Rcd. 10958, 10967 (2003) (defining CPE in reference to the network demarcation point, as "equipment that falls on the customer side of the demarcation point between customer and network facilities." (internal citation omitted)); *see also Charter Advanced Servs. v. Lange*, 903 F.3d 715, 720 (8th Cir. 2018) (adopting the Commission's definition of CPE).

[18] 47 U.S.C. § 153.

B. If The Commission Sides With Bellsouth In Any Respect, It Should Only Do So Prospectively.

The Pennsylvania Counties, the Districts, and other state and local emergency services providers around the country have relied on the Commission's existing definition of IVoIP and the Form 477 instructions for years. If the Commission were to accept BellSouth's (and other carriers') invitation to offer a retroactive interpretation of its rules, it would frustrate the Pennsylvania Counties' reasonable reliance on the existing definition of IVoIP. It would also create tension with Pennsylvania law, which required application of the Commission's definition of IVoIP at the time that bills were sent, not later.

911 emergency services providers like the Pennsylvania Counties and the Districts, as well as the telecommunications industry, have relied on the existing definition of VoIP and the Form 477 instructions for years. For example, at the time it was promulgated, the PA 911 Act adopted the Commission's definition of VoIP in 47 C.F.R. § 9.3.[19] The Pennsylvania Counties, in analyzing the 911 Act and projecting the revenue to which they were entitled, could only use the Commission's existing definitions. If the Commission were to alter the definition retroactively, it would undermine the Pennsylvania Counties' planning. Moreover, the prospect of retroactive changes to an existing definition would pose enormous public policy challenges to the Pennsylvania Counties or any other state or local governmental body that relies on the Commission's definitions or other regulatory enactments to make state and local policy. The Commission should not issue a ruling that would have the effect of undermining legislative certainty at the state or local level.

[19] 35 Pa.C.S.A. § 5302.

These risks are among the reasons why there is a well-established presumption in federal case law against retroactive application of statutes.[20] Pennsylvania also has a statutory presumption against retroactivity.[21] Consistent with these authorities, the Commission has previously observed that "whether to permit retroactive application of an agency decision 'boils down to … a question grounded in notions of equity and fairness.'"[22] Therefore, if the Commission adopts BellSouth's customer-order approach, it should acknowledge the fundamental shift that outcome will cause and specify that its ruling has only prospective application.

In addition, if the Commission were to apply its ruling retroactively, it would unnecessarily create a potential conflict with Pennsylvania law. Pennsylvania's Statutory Construction Act provides that a "reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation … as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made."[23] Put simply, this statutory provision provides that where a Pennsylvania statute includes reference to a second statute or regulation, then the version of the second statute or regulation that applies is the version in force when the first Pennsylvania statute is applied. Here, the PA 911 Act references

---

[20] *See Casey v. McDonald's Corp.*, 880 F.3d 564, 570 (D.C. Cir. 2018) (Kavanaugh, J.); *Davis v. U.S. Dep't of Justice*, 610 F.3d 750, 753 (D.C. Cir. 2010) ("There is a 'well-settled presumption' against giving statutes retroactive effect.").

[21] 1 Pa.C.S.A. § 1926 ("No statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.").

[22] *See* Order, *In re Pet. for Dec. Ruling that AT&T's Phone-to-Phone IP Telephony Servcs. are Exempt from Access Charges*, 19 FCC Rcd. 7457, 22 (2004) (quoting *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998)).

[23] 1 Pa.C.S.A. § 1937(a).

Section 9.3. That is, the PA 911 Act includes a reference to a regulation issued by a public body, so the Pennsylvania Statutory Construction Act applies. Under the Statutory Construction Act, each Pennsylvania County had to apply the version of Section 9.3 that was in effect when the PA 911 Act was applied. The PA 911 Act was applied each time a telephone service provider billed a customer because that is the point at which someone (the service provider) applied the PA 911 Act to determine how much was owed under the Act.

If the Commission were to issue a retroactive order, it would create a conflict with this provision of Pennsylvania's Statutory Construction Act because it could call into question what version of the FCC's definition was "in force" at the time that the PA 911 Act was applied. The Commission should avoid creating such a tension with state law by issuing orders that are only prospective, so that the Pennsylvania Counties and others can address them.

C. The Communications Act Did Not Preempt The PA 911 Act.

1. The Communications Act permits states to use a different rate base in determining 911 fees because IVoIP and traditional telephony impose different burdens on the 911 system.

The PA 911 Act, like the ETSA, calculated the rate base for 911 fees differently for IVoIP service than it did for traditional, wireline telephone service. It did so because IVoIP service imposes a greater potential burden on the 911 system than does wireline service and because the limits imposed on IVoIP are harder for public entities like the Pennsylvania Counties to monitor than are traditional wireline service. The arguments from BellSouth and other carriers to the contrary ignore this distinction.

Traditional wireline telephone service, such as a PRI circuit, imposes physical limits on the number of calls that can be made. For example, a PRI circuit has a limit of 23 calls. IVoIP service, on the other hand, does not impose such a physical limit. In fact, the number of calls that an IVoIP provider can handle simultaneously is limited only by the data available, assuming

the customer will accept some degradation in call quality at times. A service provider might impose a virtual limit on the number of simultaneous calls that its customer can make by imposing such a limit in an applicable software program, but that limit is not hard-and-fast. A service provider could agree to relax the limit periodically, or a certain number of times per week. Or it might provide a burstable IVoIP service, where the customer has the option of using some of its data for additional calls at times.

From the standpoint of a public entity providing 911 service, such as the Pennsylvania Counties, these distinctions have a great deal of meaning. A telephone customer with PRI service can only make a limited number of calls to a 911 system in an emergency. A telephone customer with IVoIP service could, potentially, make far more calls to the system. In addition, because wireline service imposes a physical limit on the number of calls, a public entity can easily determine the number of potential 911 calls it can receive from a location with such service. On the other hand, a public entity cannot easily determine the number of potential calls it might receive from a location with IVoIP service.

Given these differences, Pennsylvania, Alabama, and other states were justified in treating wireline and IVoIP service differently in calculating the rate base for 911 fees, just as the Communications Act permitted them to do. The ETSA required customers of VoIP service to be billed a 911 charge on every telephone number, while imposing 911 charges on access lines or voice channels for non-VoIP customers.[24] Similarly, under the PA 911 Act, the Pennsylvania Counties imposed a monthly fee on "each telephone number or successor dialing protocol

[24] BellSouth relies on the following language in section 615a-1: "the [911] fee or charge [to subscribers of interconnected VoIP services] may not exceed the amount of any such fee or charge applicable to the same class of subscribers to telecommunications services." *See BellSouth Petition* at p. 23.

assigned by a VoIP provider to a VoIP service customer that has outbound calling capability."[25] Thus, a VoIP provider in Pennsylvania was required to charge a fee on every unique phone number that had the ability to make an outgoing call. For traditional service, Pennsylvania's 911 Act imposed charges for each "local exchange access line."[26]

On its face, the Communications Act only prevents charging different "fees or charges" for different types of service. This language does not speak to the rate base to which the fees or charges are applied. Arguments to the contrary, such as the argument that CenturyLink makes at pp. 9-10 of its Comment, would change the statute by giving the words "fees" and "charges" meanings that are different from their natural meaning. Moreover, from a policy perspective, the theoretical burden that these different types of service impose on the 911 system justify different treatment, and the Commission should not interpret the Communications Act to limit the ability of state and local governments to account for those technological differences in their 911 funding regimes.

2. The preemption arguments that BellSouth and other telephone carriers advance would open a Pandora's Box.

The preemption arguments that BellSouth and other service providers advocate in this proceeding could undermine several other aspects of state 911 statutes and create an enormous amount of uncertainty about 911 fees that have already been assessed and paid. *First*, the PA 911 Act provides for discounted 911 fees for customers with multiple lines at a particular location, on a graduated scale.[27] Thus, the statute provides for step-downs in the applicable rate for lines 26-100, 101-250, 251-500, and above 501. The telephone companies have never once complained about applying these discounts or suggested that doing so violated federal law. They

[25] 35 Pa.C.S.A. § 5311.14(a)(1).

[26] 35 Pa.C.S.A. § 5307.

[27] 35 Pa.C.S.A. § 5307(b).

stayed silent both because no one thinks the graduated rates violate federal law and because it was in their interest not to agitate for a change that could have resulted in higher fees on their customers. Yet the preemption arguments that the telephone companies have advanced in this proceeding would call those graduated rates into question because telephone lines that provide the same type of service are charged different rates, which according to them violates federal law.

It does not violate federal law. Instead, the state statute makes sense. At a location with a large number of telephone connections, it is unlikely that every one of those connections will be used to make a call to 911 in an emergency. Indeed, the more connections there are, the lower the odds become of additional, marginal lines being used. Thus, a state is justified in charging less for the additional marginal phone lines because they impose a lower theoretical burden on the 911 system. That focus on the potential burden imposed on the 911 system makes such discounts permissible and is the same logic that permits states to treat IVoIP calling capabilities differently than they treat traditional wireline phone service.

Second, the PA 911 Act permits different classes of counties to charge different rates for the same types of service. In Pennsylvania, counties are classified by their population.[28] The PA 911 Act permits different classes of counties to charge different rates for the same type of service.[29] Thus, similarly situated customers could pay different rates for the same type of service, based on nothing more than which side of a county line they happened to reside. For example, Delaware County in Pennsylvania is a Second Class A County. Chester County, which borders Delaware County, is a Third Class County. Under the PA 911 Act, Delaware County therefore could and did assess a customer $1 per local exchange access line, but Chester County

[28] 16 P.S. § 210.

[29] 35 Pa.C.S.A. § 5305(g.1).

could and did assess a customer $1.25 per local exchange access line.[30] Thus, two customers that might be separated by no more than a mile, with the same type of service and the same number of lines, might pay different amounts of 911 fees. That is, the fees and charges that the customers paid at one location differed from the fees and charges that they paid at a different location, even if the service was the same

Again, no telephone company thought federal law preempted this arrangement. Certainly, the telephone companies that now claim preemption to be obvious never complained or resisted applying the different fees for different counties. Yet if the Commission were to adopt the telephone companies' preemption logic, it would risk invalidating any state statute that permits different counties to charge different rates based on any classification of counties that exists under state law. The Commission should resist such an intrusion into states' management of their own affairs.

D. This Proceeding Has Fundamental Public Policy Implications That Favor the Districts' Position.

The Commission should favor the fundamental public policy interests at stake, including the health, safety, and welfare of the citizenry. At their core, the Alabama litigations underlying this matter, as well as the other similar civil actions pending around the country (including the Pennsylvania 911 Actions), aim to ensure the proper funding of adequate 911 emergency services. As in Alabama, Pennsylvania's 911 emergency services receive the majority of their funding from the 911 fees imposed upon traditional wireline and VoIP voice services.[31] Therefore, ensuring that those 911 fees are properly assessed and collected by

---

30 *Id.*

31 *See* 35 Pa.C.S.A. § 5304(a)(1); *see also* 35 Pa.C.S.A. § 5301 note.

telecommunications service providers like BellSouth is essential to ensure that adequate 911 emergency services are provided.

Further, by constitutional design, the framers delegated to the states the power and the obligation to police and ensure the health, welfare, and safety of their citizenry.[32] The Commission has previously acknowledged that the substantial cost of providing 911 emergency services falls squarely on state and local government bodies like the Pennsylvania Counties and the Districts.[33] Thus, the Commission should respect the decision of the Pennsylvania Counties, the Districts, and other municipalities to pursue litigation that they deem critical to fulfilling their constitutional burdens. The position advanced by the Districts offers the Commission the best opportunity to remain faithful to the regulatory and statutory text while also protecting the citizenry and supporting the other important public policy interests at stake. Accordingly, the Pennsylvania Counties respectfully submit that the Commission should grant the relief requested by the Districts.

---

[32] *See Chicago, B&Q Ry. Co. v. People of State of Illinois*, 200 U.S. 561, 592 (1906) ("We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or ***the public safety***." (emphasis added)).

[33] *See In re IP-Enabled Servs. & E911 Requirements for IP-Enabled Serv. Providers*, 20 FCC Rcd. 10245, 10249 (2005) ("Responsibility for establishing and designating PSAPs or appropriate default answering points, purchasing customer premises equipment (CPE), retaining and training PSAP personnel, purchasing 911 network services, and implementing a cost recovery mechanism to fund all of the foregoing, among other things, falls squarely on the shoulders of states and localities.").

III. CONCLUSION

For the reasons discussed above, the Pennsylvania Counties support the Petition filed by the Districts and respectfully submit that the declaratory relief sought in their Petition should be granted.

Respectfully submitted:

/s/ Thomas S. Biemer
Thomas S. Biemer
Erik L. Coccia
DILWORTH PAXSON LLP
1500 Market St., Suite 3500E
Philadelphia, PA 19102
(215) 575-7000

Counsel for Commentators the Pennsylvania Counties of Berks, Bucks, Butler, Chester, Clarion, Cumberland, Dauphin, Delaware, Lehigh, Somerset, Washington, Westmoreland, and York

April 12, 2019